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October 13, 1993

Mr. William F. Caton
Secretary
Federal Communications Commission
Mass Media Services
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: GC Docket No. 92-52

Dear Mr. Caton:

On behalf of Rex Broadcasting Corporation, there is herewith an original and 5 copies of its Comments in response to the Commission's Further Notice of Proposed Rulemaking.

Should any questions arise with regard to this matter, kindly communicate directly with this office.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER

By: Bruce A. Eisen
Bruce A. Eisen

Enclosure

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In The Matter of	)	
	)	GC Docket No. 92-52
Reexamination of the Policy	)	
Statement on Comparative	)	
Broadcast Hearings	)	

To: The Commission

COMMENTS OF REX BROADCASTING CORPORATION

Rex Broadcasting Corporation ("Rex") by its attorney, hereby files its comments in response to the Commission's Further Notice of Proposed Rulemaking ("Further Notice") in GC Docket No. 92-52, FCC 93-363, released August 12, 1993. In support thereof, the following is shown:

BACKGROUND AND PROPOSAL

The Commission's Further Notice fairly states the background of this proceeding and its genesis in Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd 264 (1992). At the present time, Section 73.3597(a)(1) of the Commission's Rules provides for a one-year holding requirement on stations granted authorizations through comparative hearings. The Commission now recites that "it appears that a mandatory three-year service continuity requirement should apply to all successful applicants in comparative proceedings". Hence, the original proposal that a service continuity preference would be awarded to applicants in comparative hearings may now be extended

to cover all new licensees who have been selected through the comparative hearing process. Of great importance to Rex is the fact that the Commission's Further Notice proposes to apply the three-year holding period retroactively and to impose the longer service continuity requirement to existing as well as future authorizations.

DISCUSSION

Rex wishes to address only that portion of the Commission's Further Notice that would apply a three-year holding period to licensees or permittees who had already entered into agreements that provide for the assignments of their authorizations within the existing confines of the Commission's Rules. These parties relied upon extant rules and policies to determine contractually binding positions.

Essential to the narrow class of parties who had reached, or will have reached, an agreement under Section 73.3597(a)(1) of the Rules prior to the effective date of any rule change proposed in the Further Notice, is the mutual anticipation that their agreements could be exercised within the one-year period now set forth in the rule. If the Commission were to amend Section 73.3597(a)(1) of the Rules and to adopt a three-year holding period applicable to existing permittees and licensees, then the explicit agreements of the parties will have been negated, a circumstance which would be of little deterrent effect given the likely number of affected parties, but which

will impair the contractual rights of those who had negotiated such agreements in good faith.

Rex respectfully submits that it would be unfair for the Commission to impose a new holding period rule on broadcasters who had relied upon established Commission law at the time that they had entered into agreements for the purchase and sale of broadcast facilities. Were the Commission to apply a three-year standard retroactively, it would represent an unreasonable imposition of regulation on parties who had legally entered into binding agreements.

The Communications Act of 1934, as amended, does not expressly grant to the Commission the power to retroactively promulgate rules and regulations. Therefore, the Commission may lack authority to retroactively impose a "three-year rule" where parties had already relied upon the less restrictive holding period in reaching agreements for the transfer and assignment of broadcast facilities. The Supreme Court of the United States has addressed the question of retroactive regulation, and has held that unless Congress expressly delegates the authority, an agency should not promulgate retroactive standards. Bowen v. Georgetown University Hospital, 109 S.Ct. 468 (1988).

In Bowen, the U.S. Department of Health and Human Services promulgated a rule in 1981 for Medicare costs reimbursement. The rule redefined and effectively lowered the reimbursement to certain hospitals, several of which filed a lawsuit. The United States District Court for the District of Columbia Circuit struck down the rule because it violated the

Administrative Procedure Act ("APA"), but did not otherwise enjoin the agency from reissuing the rule after providing proper notice and comment. 109 S.Ct. at 470. The agency thereafter reimbursed the hospital based on the regulation and effect prior to 1981. However, shortly after making the payments, the Secretary reissued the 1981 rule and retroactively applied it to a fifteen-month period commencing July 1, 1981. 109 S.Ct. at 471. The hospitals, after exhausting their administrative remedies, filed suit anew. The District Court granted Summary Judgment for the hospitals which the United States Court of Appeals for the District of Columbia Circuit affirmed.

The Supreme Court held that the Secretary had impermissibly issued a retroactive rule. It held that unless Congress clearly and explicitly conveys its intent to grant the agency such authority, an agency is powerless to issue retroactive standards. 109 S.Ct. at 471 (citing Brimstone R. Company v. United States, 276 US 104, 122 (1928)). Retroactivity is not favored in the law, and a statutory grant of legislative rulemaking authority will not, as a general matter, encompass the power to promulgate retroactive rules.

In a concurring opinion in Bowen, Judge Scalia noted that the first part of the APA definition of "rule" states that a rule:

> means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure, or

> practice requirements of an agency. . ." 5 U.S.C. § 551(4) (emphasis added).

Judge Scalia concluded that the only plausible reading of the words "and future effect" is that rules have legal consequences only for the future.

Rex suggests that if an agreement is valid when made, it should not be rendered invalid by a subsequent act of the Commission, and the three-year rule should be construed prospectively in order to avoid impairing the obligations of legitimately contracting parties who had entered into agreements predicated upon existing rules. Courts have held that if a contract is valid when executed, it should be held to remain valid and enforceable to the end, no matter what changes the law may undergo in the lifetime of the agreement.

More important than the legal arguments that can be offered in support of the prospective application of a three-year rule, is the fact that imposition of such an extended standard on those who have already contracted prior to the implementation of the rule, really does not further the goals contemplated by the Commission. The Further Notice recites, at paragraph 16, that the immediate application of a longer service continuity requirement would maximize its effectiveness so that the new service continuity requirement should apply to all existing and future authorizations. It is not entirely clear what the Commission means by "maximize its effectiveness". Certainly, imposing a three-year requirement on authorized licensees and permittees would emphasize the Commission's

legitimate concern with trafficking in licenses. However, those who fall within the jurisdiction of the Commission should be able to rely upon existing cases and policies when they contract to determine their rights and obligations in a particular situation. Rather than deterrence, the application of a new and longer holding period to those who had already agreed and contracted would amount to punitive treatment.

Presumably the Commission is proposing to implement a new three-year holding period in order to warn licensees and permittees that public interest considerations warrant mandatory holding periods for authorizations won through the comparative hearing process. As the Commission states in the Further Notice, paragraph 10, a three-year holding period would serve to safeguard the comparative process from applicants with ill-considered or insincere proposals, for applicants with no serious interest in effectuating their proposals and intending to sell after one year to make a quick profit would lose that opportunity. However, it is unfair in the extreme to apply a new holding period requirement when, at the time that parties had entered into agreements for the purchase and sale of stations, Commission policy allowed such transactions to go forward. While it is, of course, within the Commission's power to take a new approach in acting upon matters before it, the Commission has held that it is a better policy to act prospectively, wherever appropriate. See, e.g., KORD, Inc., 31 FCC 85, 87-88 (1961).

In the past, the Commission has found a connection between expeditious construction and its anti-trafficking

policies. In the absence of a fair anti-trafficking policy, an applicant could apply for a facility and move through a hearing on the basis of representations made to the Commission that the facility would be constructed in a timely manner, and then dispose of the authorizations for a profit, all without construction occurring. It has been necessary for the Commission, therefore, to provide a deterrent to insincere applicants who sought to speculate in Commission authorizations. See, e.g. Applications for Voluntary Assignments or Transfers of Control, 52 RR 2d 1081, 1082 (1982). However, the dangers foreseen by the Commission likely do not exist in situations where parties have entered into Purchase and Sale agreements premised upon a licensee or permittee having already placed the subject station into operation. Surely in those cases, a retroactively lengthened holding period is unjustified.

It may be that even a rule of retroactive effect is valid if reasonable. Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967). However, a rule that has unreasonable "secondary" retroactivity, i.e. a rule that alters future regulation in a manner that adversely affects past actions taken in reliance upon the prior rule, may for that reason be arbitrary or capricious, and thus invalid. Courts can, of course, consider the reasonableness of the retroactive effect of a rule. See, National Assn. of Independent Television Producers and Distributors v. FCC, 502 F.2d 249, 255 (CA5 1971). Rex suggests that it is unreasonable to retroactively apply a three-year holding rule to cases where parties had already agreed to proceed

with a transaction that was unquestionably acceptable prior to release of the Further Notice. Importantly, deterrence would still exist if the new rule were not applied to that limited class of parties who had already reached agreement before the rule's effective date.

In light of the foregoing, if the Commission should decide to impose a mandatory three-year service continuity requirement, it is requested that such a holding period not apply to parties who have already negotiated and agreed in good faith to assign authorizations pursuant to the present requirements of Section 73.3597(a)(1).

Respectfully submitted,

REX BROADCASTING CORPORATION

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